

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER HANNA,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 252363

Macomb Circuit Court

LC No. 03-000052-FC

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349, extortion, MCL 750.213, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to concurrent sentences of 160 to 240 months in prison for the kidnapping conviction, 160 to 240 months in prison for the extortion conviction, and 60 to 120 months in prison for the assault with intent to do great bodily harm less than murder conviction. We affirm.

Defendant first argues that his convictions are against the great weight of the evidence. We disagree. “The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003), citing *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Absent exceptional circumstances, it is the sole province of the jury to determine the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). “[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if ‘it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,’ the credibility of witnesses is for the jury.” *Id.* at 643. Therefore, “[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 647.

Defendant contends that the victim’s trial testimony was so seriously impeached with prior statements and preliminary examination testimony that it was rendered completely unbelievable and insufficient to support defendant’s convictions. However, there was no direct testimony at trial contradicting the victim’s assertion that defendant was one of the perpetrators. On the contrary, there was evidence from one eyewitness placing defendant at the condominium where the repeated assaults on the victim occurred. Further, two eyewitnesses and physical

evidence corroborated the victim's version of the events. Although the victim did not mention defendant in his initial statement to police, he positively identified defendant from a photographic array shortly after the incident, and testified to defendant's identity as one of the perpetrators during the preliminary examination and at trial. Moreover, impeachment of the victim's testimony bore a limited connection with his testimony that defendant was involved in the crime. Therefore, it cannot be said that impeachment rendered the victim's trial testimony void of all probative value or utterly unbelievable by the jury. See *Lemmon, supra* at 643. After viewing the evidence in its entirety, including the impeachment evidence, the jury found defendant guilty of three of the four charges against him. To hold that the jury's verdict was contrary to the great weight of the evidence would be improperly substituting this Court's judgment in matters of credibility for the judgment of the jury. See *Lemmon, supra* at 642-647.

Defendant next argues that the trial court abused its discretion by refusing to grant a mistrial on the basis that the prosecutor engaged in misconduct by indicating in the jury's presence that the alleged leader of the group of assailants, Stewart Shaffou, had already pleaded guilty. We disagree.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the record in its entirety and evaluate the prosecutor's comments relative to defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, evidence of the conviction of an accomplice is inadmissible in the trial of a defendant, and its admission may constitute error requiring reversal. *People v Barber*, 255 Mich App 288, 297; 659 NW2d 674 (2003); *People v Kincade*, 162 Mich App 80, 84-85; 412 NW2d 252 (1987).

Here, during his opening statement, codefendant's counsel mentioned that Shaffou admitted his guilt. Thereafter, defendant's counsel told the jury of Shaffou's assault on the victim, impliedly asserting that Shaffou was the guilty party and that defendant was never involved in the assault. Assuming *arguendo* that the prosecutor's reference to Shaffou's guilty plea was erroneous, we conclude that the prosecutor's statement did not prejudice defendant. There was substantial evidence that the assault occurred, and that Shaffou was the leader. The statement that he pled guilty did not add to the properly admitted evidence in any significant way. Further, defendant's defense did not rest on Shaffou's innocence, and was not compromised by the prosecutor's reference to Shaffou's guilty plea. Additionally, the trial court instructed the jury that evidence consists of sworn testimony and the exhibits, and does not include counsels' questions to witnesses, arguments and statements. Thus, we conclude that the prosecutor's fleeting remark regarding Shaffou's guilty plea did not deprive defendant of a fair trial.

"A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Because defendant was not deprived of a fair trial, we conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next asserts that he was denied a fair trial by numerous instances of prosecutorial misconduct. Defendant claims error in the prosecutor's direct examination of the victim and numerous prosecutorial comments made during closing and rebuttal arguments. Defendant claims that the prosecutor erred by: (1) invoking the jury's sympathy; (2) arguing facts not in evidence; (3) using "civic duty" arguments; (4) denigrating defense counsel; and (5) vouching for the credibility of prosecutorial witnesses. We disagree.

Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Prosecutorial misconduct claims are decided on a case by case basis, and we review the record as a whole and evaluate the prosecutor's comments relative to defense arguments and the evidence admitted at trial. *Rodriguez, supra* at 30.

First, defendant claims that the prosecutor improperly invoked the jury's sympathy by emphasizing that the assault was vicious and brutal. Defense counsel raised no objection to these allegedly erroneous remarks at trial. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A prosecutor has the duty to provide a defendant with a fair trial even as he attempts to convict persons guilty of crimes. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor is permitted to argue the evidence and any reasonable inferences from the evidence as it relates to his theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). A prosecutor may use emotional language and is not required to argue in the "blandest" terms possible. *Ullah, supra* at 678-679.

Here, the prosecutor urged the jury to review the photographs of the victim's injuries and the victim's own testimony regarding his injuries to determine the viciousness of the assault. The crime of assault with intent to do great bodily harm less than murder requires proof that the defendant attempted with force or violence to do corporeal harm to an individual and intended to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204 (1996). The extent and brutality of the injuries were relevant to the element of intent. Accordingly, we conclude that the prosecutor's comments at issue do not constitute plain error.

The prosecutor's argument that the jury should convict defendant because "[j]ustice demands it" does not constitute error requiring reversal. This Court has held such a fleeting comment to be "relatively innocuous." *People v Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991). In addition, the comment was made subsequent to the prosecutor summarizing the compelling evidence against defendant.

Second, defendant claims that the prosecutor improperly argued facts not in evidence when she commented on the seriousness of the victim's injuries although no medical personnel testified regarding the injuries or treatment. Defense counsel raised no objection to this allegedly erroneous closing argument. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. A prosecutor is not permitted to argue facts that are unsupported by the evidence. However, a prosecutor is free to argue the evidence and any reasonable inferences arising from the evidence as they relate to the prosecutor's theory of the case. *Ackerman, supra* at 450. Here, the prosecutor referred to the victim's testimony and the medical reports to support her argument that the injuries were serious. The victim testified to

injuries including cuts and bruises on various parts of his body, a hairline fracture, and a subdural hematoma. He testified that he was told he was a “high risk” patient and that it took approximately three to four weeks for the cuts and bruises to heal. Portions of medical records from the hospital were admitted at trial, including a final diagnosis statement that the victim sustained a “subdural hematoma” and “maxillary fracture.” While the prosecutor’s remarks regarding the severity of the subdural hematoma may have gone beyond the testimony, we are satisfied that in most respects the prosecutor’s closing argument regarding the seriousness of the injuries was based on the evidence, and that the slight digression did not affect the outcome of the trial.

Third, defendant claims that the prosecutor improperly urged the jury to find defendant guilty based on its civic duty. A prosecutor may not inject issues broader than the defendant’s guilt or innocence or urge jurors to suspend their judgment. *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004). However, a prosecutor has “great latitude” in arguing the evidence and reasonable inferences from the evidence related to his theory of the case. *Id.* at 456. Moreover, a prosecutor’s remarks must be viewed in context to determine whether they constitute error requiring reversal. *Rodriguez, supra* at 30.

Here, the majority of the remarks were proper argument urging the jury to carefully consider the credibility issue, and to focus only on the crimes related to the assault. The remarks did not inject an issue broader than defendant’s guilt or innocence of the charges. Only the final sentence of the remarks to which defendant cites may be construed as an appeal to the jury’s civic duty. The prosecutor’s last sentence, that “[t]his type of lawlessness cannot be tolerated in a civilized society,” was isolated and fairly innocuous. Moreover, any resulting prejudice was likely cured by the trial court’s instructions to the jury that counsels’ comments were not evidence and that the prosecutor bore the burden of proof. See *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003).

Fourth, defendant contends that the prosecutor improperly denigrated defense counsel by arguing that defense counsel’s job was to obscure the truth. Defense counsel failed to object to this allegedly improper closing argument. Therefore, we review this issue for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764. A prosecutor is not permitted to assert that defense counsel lied or intentionally misled the jury regarding the facts of a case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). “Such arguments undermine the defendant’s presumption of innocence and impermissibly shift the jury’s focus from the evidence itself to defense counsel’s personality.” *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). However, the record must be examined as a whole, and the prosecutor’s remarks must be evaluated relative to defense arguments and evidence admitted at trial. *Rodriguez, supra* at 30.

In this case, the prosecutor commented that she contested defense counsel’s statement that his “job is a seeker of truth.” The prosecutor also argued, “Anybody who has been brutalized like that, had the threats that he had, is going to be hesitant in the first communication with the police. This is not a word game. Maybe that’s something that they teach in defense counsel school, I don’t know, but look at it.” The prosecutor’s comments were not a personal attack on defense counsel or his entire defense. Rather, they were responsive to a defense theory that the victim was untruthful about the circumstances of this case, particularly concerning his initial comments to the police. Moreover, the prosecutor’s comments supported her theory that

the victim was confused and afraid to give information to the police due to the recent vicious assault and the threats against him and his family. While the prosecutor should refrain from making references to defense counsel, we conclude that the prosecutor's remarks at issue did not deprive defendant of a fair trial.

Fifth, defendant argues that the prosecutor used the prestige of her office to improperly vouch for the credibility of prosecutorial witnesses. Again, defense counsel did not object to this allegedly improper closing argument. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. A prosecutor is not permitted to make personal assurances of a witness' veracity or claim to have personal information of which the jury is unaware that lends to the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). A prosecutor must also refrain from using his special knowledge or the prestige of his office to urge the jury to find the defendant guilty. *People v Reed*, 449 Mich 375, 398-399 (opinion by Boyle, J.); 535 NW2d 496 (1995). However,

the simple reference to a plea agreement containing a promise of truthfulness is in *itself* (not) grounds for reversal. A more accurate statement of the law appears to be that, although such agreements should be admitted with great caution, admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. [*Bahoda, supra* at 276 (quotation omitted, emphasis in original).]

A prosecutor does not insinuate that he has special knowledge or does not personally vouch for the truthfulness of a witness by merely calling a witness who testifies pursuant to a plea agreement or grant of immunity that requires the witness to testify truthfully. *Id.*

In the challenged argument, the prosecutor explained that two eyewitnesses who were originally charged in this case were later granted immunity for their truthful testimony. The prosecutor's statement that "[t]heir deal on immunity is [to] come in and tell the truth and you can have immunity" asserted the terms of the agreement. It did not include a personal assurance of the veracity of their trial testimony. The prosecutor explained that her reason for requesting immunity was to corroborate the victim's testimony, and urged the jury not to let the grant of immunity negatively impact its decision. Given the context, we conclude that the prosecutor's argument was not improper.

Defendant further argues that the prosecutor's statements constituted a pattern of improper conduct that cumulatively resulted in depriving defendant of his right to a fair trial. "Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). To reverse a conviction due to the cumulative effect of errors, "the effect of the errors must (be) seriously prejudicial." *Ackerman, supra* at 454, quoting *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227

(2001). Here, the prosecutor's statements were not erroneous and, even if the prosecutor erred, no errors were unfairly prejudicial to defendant. Accordingly, we also hold that the cumulative effect of the prosecutor's remarks did not deprive defendant of a fair trial.

Affirmed.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helene N. White